

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TEDDY LINEL ALEXANDER,

Defendant-Appellant.

UNPUBLISHED

March 15, 2007

No. 267478

Oakland Circuit Court

LC No. 2005-203264-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a bench trial in this matter, defendant was convicted of second-degree home invasion, MCL 750.110a(3), and habitual offender, fourth offense, MCL 769.12. The trial court sentenced defendant to a prison term of six to twenty years. Defendant appeals his sentence and convictions in this matter. For the reasons set forth in this opinion we affirm the convictions and sentence of defendant in this matter, but remand to the trial court for the ministerial correction of the scoring of offense variable 13 from twenty-five to zero.

Defendant and the victim worked together and from the testimony presented at trial they were friends. One weekend, while the victim was traveling north, defendant called him and inquired if they could get together and play cards. The victim informed defendant that would not be possible given that the victim was currently traveling north for the weekend. When the victim returned to his home, he found several items missing, although defendant's computers, which the victim was working on at the time of the break-in, were still in the same spot the victim had left them. The victim telephoned police and during their investigation they learned from the neighbors, who were familiar with defendant and his automobile, that they saw defendant leaving the victim's home carrying laundry baskets. When questioned by the police as to his whereabouts on the day in question, defendant alleged that he was at work during the time the neighbors saw him at the victim's home, which he later claimed in his alibi defense. A bench trial was held and the trial court found defendant guilty of second-degree home invasion and habitual offender fourth offense. This appeal ensued.

Defendant argues that that the evidence presented at trial was insufficient to overcome his alibi defense. This Court reviews de novo a claim for sufficiency of the evidence. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), lv den 468 Mich 912 (2003).

Following review of the evidence, it is clear that defendant did not have an impenetrable alibi. All of the witnesses who testified, including defendant, agreed that he was absent from work around the time that the neighbors testified they saw him at the victim's home. Additionally, defendant testified that the victim's home is only three minutes from the restaurant, providing him with ample time to get to and from the victim's home during the time frame when the victim's neighbor's testified they saw defendant at the victim's home. We therefore find this argument to be without merit.

Next, defendant argues that the trial court's misidentification of the owner of the property and the trial court's incorrect identification of the date of the offense as May 13, 2005 instead of May 14, 2005 entitles him to a new trial. While the trial court at one time during recitation of its findings did misstate the witness for the victim, the court's singular misstep with respect to the victim's identity does not demonstrate that an egregious misunderstanding of the facts occurred in this case. Similarly, the trial court's incorrect statement of the dates does not amount to a misunderstanding of the facts that entitles defendant to a new trial. The trial court demonstrated a grasp of the facts and testimony presented during recitation of its findings such that this Court will not disturb those findings, albeit they do contain slight errors.

Defendant also argues that he was deprived of a fair trial because he was denied effective assistance of counsel. The core of defendant's argument is that his trial counsel should never have acquiesced to a jury waiver in this case because at a jury trial evidence of defendant's prior convictions would be excluded, as opposed to having them known to the judge, who was acting as the trier of fact.

A claim of ineffective assistance of counsel is preserved for appeal by a timely motion for new trial or evidentiary hearing. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Defendant did not move for a new trial or evidentiary hearing, so his claim of ineffective assistance of counsel is not preserved, limiting our review to mistakes apparent on the record. *Marji* at 533.

An accused's right to counsel encompasses the right to "effective" assistance of counsel. US Const Am VI; Const 1963, art 1, Section 20; *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed2d 674 (1984). Reversal of a conviction is required where counsel's performance falls below an objective standard of reasonableness, and the representation so prejudices the defendants as to deprive him of a fair trial. *Strickland* at 466 US 687. The defendant must overcome the presumption that counsel's actions were based on reasonable trial strategy. *Id.* at 68. Appellate courts will not substitute their judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94, 1v den 467 Mich 910 (2002). However, counsel will still be found ineffective despite a strategic decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 573-574; 419 NW2d 609, 1v den 430 Mich 880 (1988).

In this case, defendant executed a waiver of right to trial by jury form that satisfied the requirements of MCL 763.3. Defendant was asked on the day of trial whether he had signed the waiver to which he responded in the affirmative. When asked if he still wanted to proceed with a bench trial the defendant again responded in the affirmative thereby causing a second waiver to be executed. Thus, there is no question that defendant voluntarily waived his right to a trial by jury.

What defendant contends on appeal is that such waiver constituted ineffective assistance because it would allow the trial court, sitting as the trier of fact to have familiarity with defendant's prior record. Waiver of a jury trial is trial strategy and we cannot find that it was so unsound as to justify a new trial, or that defendant was denied any rights afforded him by the Constitutions of the United States or the State of Michigan. Defendant's argument fails to consider this Court's holding in *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55, lv den 465 Mich 893 (2001), wherein we stated that "A judge unlike a juror possesses an understanding of the law which allows him to ignore...[evidentiary] errors and to decide the case based solely on the evidence properly admitted at trial." Because that is precisely what occurred in this case, defendant's claim of ineffective assistance of counsel deserves no further analysis by this Court in concluding that defendant is not entitled to a new trial.

The last issue raised by defendant is that he was improperly scored 25 points for offense variable (OV) 13. The prosecutor concedes that OV 13 was misscored at 25 points, and agrees that the resulting guideline range is 29 to 114 months. However, because defendant's six-year minimum sentence imposed by the trial court is within the appropriate guidelines range, defendant is precluded from arguing his right to resentencing on appeal. *People v Francisco*, 474 Mich 82, 90 n 8; 711 NW2d 44 (2006). Although the issue was not raised by the defendant, in *People v Melton*, 271 Mich App 590, 593, 596; 722 NW2d 698 (2006), this Court recognized that because "a scoring error may...affect a defendant through such things as its effect on the calculation of parole eligibility," remand for correction of defendant's sentencing guidelines score is appropriate even where resentencing is not required. Thus, we affirm defendant's convictions and sentence but remand for the ministerial task of correcting OV 13 from 25 points to 0.

Affirm in part and remand in part. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello